82-607

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ALEXANDER L. STEVAS,
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No. ——

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

RICHARD STEPHEN DUNN,
Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
a/k/a AMTRAK,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Richard L. Goerwitz, Jr.*
SWARTZ, CAMPBELL & DETWEILER
1700 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
Attorneys for Respondent
**Counsel of Record*

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 238-2000 ● 55

COUNTERSTATEMENT OF QUESTION PRESENTED

Does a federal court have the power to enjoin a party from relitigating in a state court the exact claim which had previously been tried, settled and dismissed with prejudice by a federal court?

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TABLE OF AUTHORITIES

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Federal Rule of Civil Procedure:

Rule 41 (a) (1) (ii)	3
Rule 60 (b)	2

COUNTERSTATEMENT OF THE CASE

Plaintiff instituted an action in the United States District Court for the Eastern District of Pennsylvania pursuant to the provisions of the Federal Employer's Liability act to recover damages for injuries arising out of an accident at work. That action was tried, settled and dismissed with prejudice. Plaintiff then began a second identical cause of action in the Pennsylvania State Courts. The United States District Court for the Eastern District of Pennsylvania enjoined plaintiff from proceeding further with the relitigation of this claim. This action was affirmed by the United States Court of Appeals for the Third Circuit and plaintiff's Petition for Reargument before the Court en Banc was denied.

COUNTERSTATEMENT OF THE FACTS

The statement in appellant's petition that "the plaintiff refused this additional offer because the Railroad had stated that he could return to work if he so desired" is untrue and is unsupported by the record.

In any event, if true, these facts might give rise to a motion pursuant to Federal Rule of Civil Procedure 60(b), which was never attempted by counsel or a proceeding under the Collective Bargaining Agreement which was never attempted on plaintiff's behalf. Plaintiff did, however, bring an action on these facts. Summary judgment was granted to the defendant upon that claim by Newcomer, J., Richard Stephen Dunn v. National Railroad Passenger Corporation, a/k/a Amtrak, U.S.D.C., E.D. of Pa., CA No. 81-2088.

The facts set forth by petitioner might indicate that there were two different issues i.e. in the United States District Court the subject being an action for damages pursuant to the Federal Employer's Liability act and in the state court an action for refusal to re-employ the petitioner. An examination of the Complaint filed in the state court and an examination of the Complaint filed in the federal court will show that they are identical and both state a claim for damages under the Federal Employer's Liability Act. Neither Complaint makes a reference whatsoever to the failure to re-employ the petitioner. It is the basic action pursuant to the Federal Employer's Liability act which the petitioner now attempts to relitigate in the state courts.

Should the plaintiff overcome the preliminary issues in the state court action of the release and res adjudicata the plaintiff would only succeed in then being entitled to relitigate the exact same Federal Employer's Liability Action which was settled and dismissed with prejudice by stipulation of counsel.

REASONS FOR DENYING THE WRIT

The Anti-Injunction of 28 U.S.C. Section 2283 has been held in many cases to authorize the Courts of the United States to restrain state court proceeding relitigating issues already decided in federal litigation.

Mitchum v. Foster, 92 S.Ct. 2151, 407 U.S. 255, 32 L.Ed. 2d 705 (Fla. 1972). The contrary decisions following *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941) were decided prior to the amendment of Section 2283 on June 25, 1948.

The instant action was dismissed with prejudice (A 8-9) and the Common Pleas action is an exact duplication of that cause of action as may be seen by a comparison of the Complaints (A 1-7). Dismissal with prejudice constitutes an adjudication of the merits as fully and completely as if the Order had been entered after trail. *Gambocz v. Yelencsics*, 468 F.2d 837 (C.A. 3d, 1972); *Lawler v. National Screen Service Corp.*, 349 U.S. 322, 327 (1955). Therefore, the doctrine of *res adjudicata* bars relitagation of plaintiff's claims that were dismissed in the prior suit against defendent Amtrak.

The argument of petitioner and the cases cited therein are premised upon the assumption that there was no judgment entered by the United States District Court for the Eastern District of Pennsylvania in the first action which could then be interfered with by prosecution of a second identical cause of action in the state court. This is an inappropriate premise as a dismissal with prejudice by stipulation of counsel pursuant to the provisions of Federal Rule of Civil Procedure 41(a)(1)(ii) is equivalent to a dismissal on the merits following trial. *Gambocz v. Yelencsics, supra*, and *Lawler v. National Screen Service Corp., supra*.

The cases cited by petitioner do not deal with an attempt to relitigate in the state court and cause of action previously dismissed on the merits by a federal court.

It is just this type of vexatious relitigation which the federal courts are empowered to enjoin and should enjoin ". . . to protect or effectuate its judgments."

Respondent respectfully requests This Honorable Court to deny the Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

SWARTZ, CAMPBELL & DETWEILER

By _____
Richard L. Goerwitz, Jr.
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD STEPHEN DUNN	:	CIVIL ACTION
v.	:	No. 79-2282
NATIONAL RAILROAD PASSENGER	:	JURY TRIAL
CORPORATION, a/k/a AMTRAK	:	DEMANDED

COMPLAINT

1. Plaintiff's action arises under the Act of Congress of April 22, 1908, 35 Stat. 63, Chapter 149 and amendment thereto, commonly known as the Federal Employers' Liability Act, 45 U.S.C. Sections 51 et seq., as hereinafter more fully appears.

2. The defendant is a railroad corporation organized and existing under and by virtue of the laws of the District of Columbia, and was at the time of the injury hereinafter alleged, and is now doing business within the jurisdiction of this Court as an interstate common carrier of passengers and freight for hire into and from various states of the Union.

3. At the time of the accident and injuries hereinafter alleged, Richard Stephen Dunn was employed by the defendant as a truck driver and was engaged in work in furtherance of interstate commerce.

4. On or about March 23, 1979, plaintiff was in the course of his duties required to work at the defendant's Penn Coach Yards at Philadelphia, Pennsylvania, and while so engaged, was injured.

5. The said injuries to the plaintiff were caused by the negligence and carelessness of the defendant, its agents, servants, and employees.

6. As a result of the aforesaid accident, the plaintiff sustained severe and extensive injuries including injury to his back, a herniated disc, phlebitis of the right leg, severe emotional distress, and severe shock to his nervous system; all of which have caused him great mental

anguish and physical pain and inconvenience; he has required hospital, surgical and medical care and treatment; he has been incapacitated; all of which will continue in the future.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

MEYER, LASCH,
HANKIN & POUL

By_____
Attorneys for Plaintiff

I certify that the within is a copy of the original complaint filed in this case.

MEYER, LASCH, HANKIN & POUL
By: ALBERT M. HANKIN, ESQUIRE
Attorney for Plaintiff
Identification No.: 03963
12th Floor — One East Penn Square Building
Philadelphia, Pa. 19107
(215) LO 4-1040

RICHARD STEPHEN DUNN 603 Glenfield Avenue Glenolden, PA 19036	:	IN THE COURT OF COMMON PLEAS OF
v.	:	PHILADELPHIA
NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK 1617 Suburban Station Bldg. Philadelphia, PA 19102	: : : :	COUNTY TRIAL DIVISION JULY TERM, 1981 NO. 2280

Notice

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

"YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A

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LAWYER REFERENCE SERVICE
Widener Building, Second Floor
1339 Chestnut Street
Philadelphia, PA 19107
686-5698

A-5

AVISO

La han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defienda, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandants y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

"LLEVE ESTA DEMANDA A UN ABOGADO IMMEDIATAMENTE SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGA."

SERVICIO DE REFERENCIA LEGAL
Widener Building, Segundo Piso
Filadelfia, Pennsylvania 19107
Telefono: 686-5698

MEYER, LASCH, HANKIN & POUL

By _____
Albert M. Hankin
Attorney for Plaintiff

COMPLAINT IN TRESPASS

1. Plaintiff's action arises under the Act of Congress of April 22, 1908, 35 Stat. 63, Chapter 149 and amendments thereto, commonly known as the Federal Employers' Liability Act, 45 U.S.C. Sections 51 et seq., as hereinafter more fully appears.

2. The defendant is a railroad corporation organized and existing under and by virtue of the laws of the District of Columbia, and was at the time of the injury hereinafter alleged, and is now doing business within the jurisdiction of this Court as an interstate common carrier of passengers and freight for hire into and from various States of the Union.

3. At the time of the accident and injuries hereinafter alleged, Richard Stephen Dunn was employed by the defendant as a truck driver and was engaged in work in furtherance of interstate commerce.

4. On or about March 23, 1979, plaintiff was in the course of his duties required to work at the defendant's Penn Coach Yards at Philadelphia, Pennsylvania, and while so engaged was injured.

5. The said injuries to the plaintiff were caused by the negligence and carelessness of the defendant, its agents, servants, and employees.

6. As a result of the aforesaid accident, the plaintiff sustained injuries to his back and spine, including a herniated disc, phlebitis of the right leg, and a severe shock to his nervous system, and inconvenience; have required him to incur expenses for medical and hospital care; and he is unable to enjoy his avocations. He has been advised by the defendant that he is permanently disabled and permanently incapacitated from performing his work. On information supplied by the defendant, plaintiff believes and therefore avers that all of this will continue in the future.

WHEREFORE, plaintiff demands Judgment against the defendant in a sum in excess of $15,000.

MEYER, LASCH, HANKIN & POUL

By: _____
Albert M. Hankin
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

RICHARD STEPHEN DUNN, being duly sworn according to law, deposes and says that he is the above-named plaintiff and that the facts contained in the foregoing Complaint are true and correct to the best of his knowledge, information, and belief.

Richard Stephen Dunn

SWORN TO AND SUBSCRIBED :
before me this 16th day :
of July, 1981. :

Notary Public

SAMANTHA NARELLE KIRKLAND
Notary Public, Phila., Phila. Co.
My Commission Expires Dec. 3, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD STEPHEN DUNN	:	
	:	CIVIL ACTION
v.	:	NO. 79-2282
NATIONAL RAILROAD PASSENGER CORP.	:	

ORDER

AND NOW, TO WIT: this 18th day of June 1980, it having been reported that the issues between the parties in the above action have been settled and upon Order of the Court pursuant to the provisions of Rule 23(b) of the Local Rules of Civil Procedure of this Court (effective January 1, 1970), it is

ORDERED that the above action is DISMISSED with prejudice, pursuant to agreement of counsel without costs except as provided by Local Rule 38(d).

MICHAEL E. KUNZ, Clerk

By _____
Deputy Clerk

June 19, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEYER, LASCH, HANKINS & POUL
By: HERMAN B. POUL
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(215) LO 4-1040

RICHARD STEPHEN DUNN	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 79-2282
NATIONAL RAILROAD PASSENGER	:	
CORPORATION, a/k/a AMTRAK	:	

STIPULATION TO DISMISS

AND NOW, to wit, this 30th day of June, 1980, it is agreed between MEYER, LASCH, HANKIN & POUL, Esquires, Attorneys for Plaintiff; and RICHARD L. GOERWITZ, JR., Esquire, Attorney for Defendant, that the above entitled action is dismissed with prejudice and without costs.

MEYER, LASCH, HANKIN & POUL

By: _____
Attorneys for Plaintiff

_____
Richard L. Goerwitz, Jr.
Attorney for Defendant